

INITIAL STATEMENT OF REASONS

The statutes administered by PERB did not, prior to 2002, mandate recognition of employee organizations based solely on a review of proof of support materials. While certain of the statutes, including the Educational Employment Relations Act (EERA) and Higher Education Employer-Employee Relations Act (HEERA), allowed for voluntary recognition based on verification by PERB of a petitioner's majority support, and in fact voluntary recognition was quite common under EERA, recognition was never mandated without an election.

Effective January 1, 2002, the Meyers-Milias-Brown Act (MMBA) was amended to require an employer to recognize an employee organization based solely on a card check, so long as the petition involved an appropriate unit and there was no competing organization. Since PERB seldom directly handles representation matters under the MMBA, this change did not significantly affect how PERB processed cases.

However, both EERA and HEERA were amended, effective January 1, 2004, to also provide for card check recognition where a petitioner demonstrates majority support in an appropriate unit and there is no intervening petitioner. These legislative developments largely form the basis for the substantive changes being proposed.

The most extensive area of proposed changes involves proof of support. While a number of changes are recommended, and are explained further below, particular attention is merited for two changes. First, the proposed changes would add a requirement for proof of support in cases where a petition may lead to recognition of the petitioner as exclusive representative without an election. In such a case, the Board will consider adding a requirement that the proof of support material include language by which the employee signing a proof of support document acknowledges that an election may not be required.

Second, the Board will consider regulations addressing when and how an employee can revoke an authorization card or petition previously signed by the employee. In early 2006, the Board for the first time recognized a right of employees to revoke authorization cards. (Antelope Valley Health Care District (2006) PERB Decision No. 1816-M.) The Antelope Valley decision addressed the issue in the context of an unfair practice charge case arising under the MMBA and did not address when support may be revoked or how it may be revoked. The proposed regulations would provide both procedural and substantive requirements for revocation of proof of support, including provisions that would make revocation available as an option only in cases that may not require an election. Thus, revocation would not be available in cases, such as fair share fee rescission and decertification, where no change in the status quo can result without an election.

Another substantive change addressed by this package provides a mechanism for PERB to certify an exclusive representative under EERA where the requirements for card check recognition are met. A similar provision was previously adopted for HEERA, and the addition of a new section 33485 is proposed for EERA as a means to facilitate the closure of representation cases under that Act.

In addition to the substantive changes in the areas described above, this rulemaking package includes numerous changes to existing regulations that are proposed to clarify, conform or correct the regulation.

Section 32135 sets forth filing requirements, including in subsection (c) the service requirements for documents filed by fax or on-line. The proposed revisions to subsection (c) are intended to conform the language to changes to Section 32140 that were approved by the Board in February 2006 and that took effect May 11, 2006.

Section 32166 provides a means for an organization to become a full party to a representation hearing, and includes a proof of support requirement. The regulation includes cross-references to the proof of support provisions in Chapters 1 and 5, but was not amended to include reference to Chapters 7 and 8 that were added to the regulations in 2004. The proposed revision corrects this oversight.

Section 32500 concerns requests for judicial review of a Board decision in a representation matter. The regulation allows 20 days from the date of the decision for such a request to be filed, but only allows 10 days for responses to the request. With other appeals, such as exceptions to a proposed decision and administrative appeals, responding parties are allowed a time equivalent to that given to the appealing party. The proposed revision would bring section 32500 into conformance with this general policy.

A nonsubstantive, grammatical correction is proposed for section 32630. Section 32630 concerns the issuance of a refusal to issue complaint and dismissal of an unfair practice charge.

Changes to subsection (a) of sections 32700, 61020, 81020 and 91020 are proposed addressing two concerns. The first involves an effort to describe in plain English the requirements as to the statement of intent that must be a part of the proof of support document(s). The nature of the language required varies by type of filing, and the revisions proposed here are intended to spell out those differing requirements in one place to make the regulation more useful to employees and employee organizations who circulate or are asked to sign proof of support.

The second change, affecting only subsection (a)(1) of the same sections, concerns representation petitions that can result in recognition of the petitioner without an election. While EERA and HEERA as first enacted allowed for voluntary recognition of a majority petitioner, if no competing organization intervened, the statutes also allowed the employer to require an election. With recent legislative enactments, “card-check recognition” is mandated under EERA, HEERA, MMBA, the Trial Court Act and the Court Interpreter Act where the petitioner demonstrates majority support in an appropriate unit and no competing organization successfully intervenes. These legislative developments mean that, in many cases, the review of the proof of support constitutes the “election.” This has led to heightened concerns and interest regarding employee awareness of the significance and consequences of the documents that they are asked to sign. The change proposed would provide for an additional requirement with regard to the intent content of proof of support documents in such cases.

In addition, the deletion of paragraph (5) in section 32700(e), as well as in sections 61020(d), 81020(d) and 91020(d), is proposed. This change would remove the provision allowing a petitioner to submit, as its proof of support, “other evidence as determined by the Board” in lieu of one of the specific types of documents otherwise listed.

The final change affecting sections 32700, 61020, 81020 and 91020, involves the deletion of a sentence in subsection (g) of section 32700 and subsection (f) of the other sections that contemplates a Board agent making a “prima facie” determination concerning alleged fraud or coercion in the gathering or submission of proof of support. The prima facie standard, more often utilized in unfair practice cases as a threshold question in the processing of a charge, is not appropriate in this context. The sentence at issue implies that PERB will investigate the fraud or coercion allegations only if a prima facie showing is made. The proposed revisions are intended to make it clear that any such allegations, if supported by evidence, will be investigated and addressed in the support determination finding.

The intent of proposed new sections 32705, 61025, 81025 and 91025 is to provide guidance for employees, parties and PERB staff with regard to the revocation of proof of support. The proposed sections would provide in part that only the petitioner may withdraw proof of support materials submitted to the Board. The proposed language limits individual employee revocations to situations where an election may not be required, recognizing that where an election is held employees have an opportunity, at the ballot box, to signify their change of heart. Under EERA, HEERA and the MMBA, as well as the two trial court acts, a majority petitioner in an appropriate unit must be recognized by the employer unless a competing organization intervenes with at least 30 percent proof of support. Having signed a card for the majority petitioner, the employee may not have an opportunity, without the revocation process, to effectuate a change in his or her intent to support the petitioner. The proposed new sections also provide that submission of revocation cards must be by the employee him or herself. This language is intended to mitigate the filing of unfair practice charges alleging that an employer or employee organization has coerced employees into revoking support for a petitioner. The language proposes a time period for the submission of revocations that is congruent with the posting/intervention period. This language recognizes the interest in expedited resolution of questions concerning representation. The proposals also assure confidentiality for employees who submit revocations, and seek only minimal information in addition to the required intent language; both provisions are consistent with requirements for authorization cards and petitions.

In 2006, the Board approved various amendments to sections 32781, 61450, 81450 and 91450 (unit modification petitions). In addition to clarifying when majority employee support would be required for a unit modification petition, the amendments also provided for circumstances where at least 30 percent employee support would be required. The changes to sections 32781, 32784, 32786, 61450, 61470, 61480, 81450, 81470, 81480, 91450, 91470, and 91480 are, with one exception, proposed to conform language as necessary to reflect the changes adopted earlier. The exception concerns proposed language to be added to section 32786(b) that addresses an instance where unit modification petitions should be dismissed, and conforms the language to that presently found in sections 61480, 81480 and 91480.

Proposed new section 33485, and a conforming change to section 33480, would provide for the certification of an exclusive representative under the EERA where no election is required.